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IN THE

Supreme Court of the United States

October Term, 1941.

1254

Nos. 1255-~~1256.~~

JUDSON ZIMMER, Substitute Trustee of FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY,
Petitioner,
v.
NEW YORK STATE TAX COMMISSION,
Respondent.

Order No. 168.

JUDSON ZIMMER, Substitute Trustee of FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY,
Petitioner,
v.
NEW YORK STATE TAX COMMISSION,
Respondent.

Order No. 169.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The New York State Tax Commission, the respondent in the above entitled causes, respectfully prays that the petition of the petitioner, Judson Zimmer, Substitute Trustee of Fonda, Johnstown and Gloversville Railroad Company, for a writ of certiorari to the Circuit Court of Appeals for

the Second Circuit be dismissed, or that the writ of certiorari be denied for the reason that the Court should not in the exercise of sound discretion grant the same.

Statement of the Case.

The facts herein are not in dispute and are correctly set forth in the petition for the writ herein, and for that reason we refrain from burdening the Court with mere restatement.

Questions Involved.

The questions which were before the Circuit Court of Appeals for the Second Circuit for determination were as follows:

1. Is a Trustee who operates a railroad during a period of reorganization liable for corporation franchise taxes assessed under Sections 183 and 184 of the New York State Tax Law and accruing subsequent to the filing of the petition for reorganization on April 20, 1933, and prior to June 18, 1934, when Congress enacted Section 124-a of the Judicial Code (U. S. C. A. Title 28, §124-a)?

2. Is the Trustee of a railroad corporation in reorganization, who continues to operate the business of a railroad, liable to the State of New York for corporation franchise taxes assessed under Sections 183 and 184 of the New York State Tax Law as the result of the enactment by Congress of the Act of June 18, 1934 (U. S. C. A. Title 28, §124-a), which provides as follows:

> "Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes

applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States, imposing the same."

3. Are such taxes a proper expense of administration?

ARGUMENT.

I.

The Court should not in the exercise of its sound discretion allow the writ herein.

The Circuit Court of Appeals in passing upon these cases has said:

> "While the matter is not free from doubt, the decisions of the Supreme Court in *Michigan v. Michigan Trust Co.*, 286 U. S. 334; *Boteler v. Ingels*, 308 U. S. 57 and *Palmer v. Webster & Atlas Bank*, 312 U. S. 156, 163, seem to indicate that franchise taxes imposed upon a corporation both for doing business and for being a corporation are proper charges against either a receiver or a trustee at least unless the trustee be only one in dissolution of the company. In the last two decisions cited, the Act of June 18, 1934, was discussed and held to cover even a trustee in ordinary bankruptcy. Justice Black writing for the court in *Boteler v. Ingels*, 308 U. S. at page 60, not only said that the Act of June 18, 1934, required payment of certain franchise taxes by a trustee but also made the following observation:
>
> 'We need not determine whether, without legislation such as the 1934 Act, the fact that a local business in bankruptcy is operated by a bankruptcy trustee makes the business immune from state laws and

> valid measures for their enforcement. Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act. At any rate, Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to state taxes "the same as if such business(es) were conducted by an individual or corporation".' "

The questions involved herein have been similarly passed upon by the Circuit Courts of Appeal for the Third and Eighth Circuits in the cases of *In re Pressed Steel Car Co.*, 100 Fed. (2d) 147, and in *Thompson v. State of Louisiana*, 98 Fed. (2d) 108, and *Thompson v. State of Arkansas*, 98 Fed. (2d) 112.

It would seem, therefore, in view of the decisions of the Circuit Courts of Appeal for the Second, Third and Eighth Circuits, referred to above, and the expressions of this Court in *Boteler v. Ingels*, 308 U. S. 57, and *Palmer v. Webster & Atlas Bank*, 312 U. S. 156, that there is a uniformity of opinion with respect to the questions presented by the petition herein, and since that is so the petition for the writ of certiorari herein should be denied.

Respectfully submitted,

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